JASON WHITEMAN, SR.,	:	Order Affirming Decision
Appellant	:	
	:	
v.	:	
	:	Docket No. IBIA 94-13-A
BILLINGS AREA DIRECTOR,	:	
BUREAU OF INDIAN AFFAIRS,	:	
Appellee	:	April 21, 1994

Appellant Jason Whiteman, Sr., seeks review of a September 8, 1993, decision of the Billings Area Director, Bureau of Indian Affairs (Area Director; BIA), concerning the decision to advertise certain portions of Allotment 600 on the Northern Cheyenne Reservation. For the reasons discussed below, the Board of Indian Appeals (Board) affirms that decision.

Allotment 600 contains approximately 160 acres and is owned by six individuals. Appellant owns approximately 57 percent of the allotment; Philip Whiteman, Sr., owns approximately 33 percent; Josie Whiteman owns approximately 6 percent; and Robert Whiteman, Raynalea Whiteman, and Gary Whiteman own approximately 1 percent each.

The allotment is divided into a northern and a southern section by Highway 212. Approximately 110 acres of the allotment are leased for range purposes. The Northern Cheyenne Housing Authority has a 25-year lease for 2.48 acres, which is assigned to Philip. A total of 39.85 acres is not leased or otherwise included in homesites or rights-of-way. The unleased acreage is located on both sides of Highway 212. Philip's homesite is within the southern section of the unleased acreage, and appellant's home is within the northern section of the unleased acreage. Apparently, there is no right-of-way in place for access to either home.

On June 19, 1992, Philip requested a lease covering the unleased acreage in Allotment 600. I t appears that at that time Philip was informed of the procedures for leasing the tract and that he would have to secure consents from the other co-owners.

In July 1992, the owners of Allotment 600 were notified of their right to negotiate a lease of the unleased 39.85 acres. By letter dated July 21, 1992, appellant requested a lease of the portion of the allotment along Highway 212.

The next document in the administrative record is a February 1, 1993, note which indicates that BIA personnel spoke with appellant and Philip. The note indicates that Philip had asked to lease the unleased acreage south of Highway 212, and that appellant agreed that he would lease the northern portion of the unleased acreage, and Philip would lease the southern portion. The note also states that appellant said he would sign an access road

right-of-way to Philip's homesite, if Philip would do the same for appellant's house. A later note in the record indicates that Philip came to the agency office on February 3, 1993, with a letter requesting to lease the entire 39.85 acres. The letter states:

> As of August 92, and January 93 and as of today we are notifying you again of leasing the land. We are willing to a reasonable and fair amount to pay on grazing fees. As you are aware we have been living on the land and using it for a number of years before [appellant] has even became an heir. And we would like to continue using the land.

By letters dated March 19, 1993, the Superintendent, Northern Cheyenne Agency, BIA (Superintendent), informed appellant and Philip that he would advertise the availability of the 39.85 acres. The letter to appellant states:

> You requested a lease of Allotment No. 600 on July 17, 1992, upon receipt of your ninety (90) day notice. As you are aware we had a prior request to lease from another co-owner. Unfortunately neither of you would agree on a lease of the entire tract.
>
> Therefore, since all administrative measures available failed to secure a lease from the other heirs, I have decided to advertise this property to the general public.

The letter to Philip states:

> We recognize the right of an Indian owner to make use of his own land provided the individual claiming owner's use is compensating the other heirs and the property is currently in use by the person claiming owner's use. It makes no difference if the landowner claiming owner's use owns a majority or minority interest, as long as he is a co-owner. Bureau of Indian Affairs staff must ensure all the co-owners are being paid the fair market rental or if any of the co-owners have waived rental. In the event an owner doesn't pay the others, then there's an ouster. Ninety day notices are issued and the property is advertised.
>
> You requested a lease on Allotment No. 600 in June 19, 1992, we requested Ninety (90) day notices for this tract the same day. During this ninety (90) day period we received another request to lease Allotment No. 600. Both requests received were from co-owners. Neither co-owner would agree on a lease.
>
> In your letter of February 3, 1993, you indicated that you have been living on this property and using it for a number of years and would like to continue to use the property. Your homesite is a lease for a specific purpose and does not tie up the remaining acreage or prevent it being leased to another party. A partial owner using this land for grazing or hay-cutting without compensation to the owners is not considered protecting the interests of the other owners. Neither would use by a partial owner

for some purpose which denied the other owners benefit of a higher and better return. An example would be grazing use by partial owner when the tract could be leased for farming, industrial or commercial purposes.

Therefore, since all administrative measures available failed to secure a lease from the other heirs, I have decided to advertise this property to the general public.

Both appellant and Philip appealed to the Area Director from the decision to advertise the tract. On September 8, 1993, the Area Director issued the decision presently under appeal. The Area Director noted that neither appellant nor Philip provided documented evidence from the remaining co-owners consenting to lease, or establishing owner's use. He also stated that compliance inspections conducted by agency staff did not disclose any agricultural activity or livestock on the unleased portions of the allotment, although on one occasion there were several horses within Philip's homesite. The Area Director upheld the advertisement, stating that advertising would allow any of the owners or the general public the right to bid on the allotment, thus ensuring that the owners would receive the highest income from the land.

Appellant appealed from this decision. Although appellant did not file an opening brief, he submitted a copy of the statement of reasons he filed with the Area Director. Philip filed a document which he styled "Philip Whiteman Sr. v. Billings Area Director," and entitled "Appellant's Brief." Because Philip did not file a timely notice of appeal, this document can be accepted only as a brief submitted by a party opposing appellant's appeal.

Attached to appellant's notice of appeal to the Board are three statements signed by Raynalea, Josie, and Robert. 1/ Each statement says:

I, * * *, support [appellant's] notice of appeal regarding co-leasing the farm/pasture unit in Allotment 600. My understanding is [appellant] would lease the acreage north of Highway 212 and Philip * * * would lease the acreage south of Highway 212 in a total of 39.85 acres.

Appellant's statement of reasons to the Area Director states:

I am willing to co-lease with Philip * * * if this farm/ pasture lease tract is not advertised and agreed by all parties involved on the Allotment No. 600. I would lease the north section of Highway 212 in the farm/pasture tract around my house. I am willing to agree that Philip * * * lease the south section of Highway 212 in the farm/pasture tract around his house/homesite. I believe this would minimize problems as co-owners of this Allotment No. 600.

1/ Robert's statement is signed by Raynalea for Robert, and indicates that Raynalea has a power of attorney for Robert.

Philip argues that the entire unleased acreage should be leased to him under owner's use.

Under 25 CFR 162.2(a)(4),

> [t]he Secretary may grant leases on individually owned land on behalf of * * * the heirs or devisees * * * who have not been able to agree upon a lease during the three-month period immediately following the date on which a lease may be entered into; provided, that the land is not in use by any of the heirs or devisees.

BIA properly notified the owners of interest in leasing the unleased portions of the allotment, and allowed in excess of 90 days in which they could negotiate a lease. The owners were unable to agree on a lease. Accordingly, BIA had authority to lease the land or advertise its availability. Appellant has not raised any arguments showing that this authority did not exist or was not properly exercised.

Although Philip alleges he has used this property since 1975, the Area Director's decision specifically held that owner's use had not been shown. Philip's unsupported allegation of use on appeal is insufficient to require reversal of the Area Director's decision. 2/

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the September 8, 1993, decision of the Billings Area Director is affirmed. 3/

Kathryn A. Lynn	Anita Vogt
Chief Administrative Judge	Administrative Judge

2/ As Philip contends in his answer brief, his use of his homesite is separate and apart from his use of other unleased portions of the allotment. It is use of those other portions that the Board concludes has not been shown.

3/ It is clear that the disagreement here was caused not as much by the Area Director's decision as by the fact that the allotment is fractionated between family members who are not on good terms. It is also clear that the majority of the interest holders, both in terms of number (4 of 6) and in terms of interests held (65 percent), want to lease the property to both appellant and Philip, so that each individual will be entitled to use the property around his home. This is an eminently reasonable use of the unleased portions of the allotment. It is also an arrangement which, especially if coupled with the execution of appropriate rights-of-way to appellant's and Philip's homes, could be the basis for a lasting resolution of this dispute, without the necessity for continual BIA intervention.

The Board's decision in this appeal does not preclude the parties from settling their dispute at any time prior to the advertisement of the availability of the lease.